IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-24

PETER ROSENBRUCH,

Petitioner,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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IN THE

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OCTOBER TERM 1976.

No. ——

PETER ROSENBRUCH,

Petitioner,

vs.

AMERICAN EXPORT ISBRANDTSEN LINES, Inc.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Peter Rosenbruch prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals from the Second Circuit entered in the above case on April 19, 1976.

Opinions Below.

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto as Exhibit A.

There were two District Court orders inasmuch as, in considering the motion for summary judgment, the District Court overlooked the issue as to deviation, the basis for this petition. Consequently, the District Court's opinion entered March 15, 1973, reported at 357 F. Supp. 982, is not attached hereto inasmuch as it does not deal with the issue which is the subject of this petition. The

District Court's order (not officially reported), entered March 27, 1973, is attached hereto in the appendix as Exhibit B.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 19, 1976. A timely petition for re-hearing was made and denied on May 5, 1976. This petition was filed within ninety days of the latter date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented.

1. Whether the Court of Appeals should have followed the rule established by the Supreme Court in *St. Johns Corp. v. Cia. Geral,* 263 U. S. 119, that a "clean" bill of lading (i. e., one not endorsed to indicate the cargo has been stowed on deck) imports under-deck stowage, notwithstanding an option to stow on or under deck, so that stowage on deck by the carrier results in a "deviation" with consequent full liability for loss overboard of the cargo.

2. Whether an ocean carrier's bill of lading terms and tariffs purporting to give it the option to stow containers on deck, even where clean bills of lading have been issued, supersede the rule established by this Court to the contrary, and supplementary sections of the U. S. Carriage of Goods by Sea Act, to wit, 46 U.S.C. Sec. 1301(c), Sec. 1312 and Sec. 1303(8).

3. Whether, within the purview of 46 U.S.C. Sec. 1304(5) (which provides that the carrier's maximum liability shall not be less than $500 per package), the 129 packages of household goods of the petitioner or a forty-foot long

reusable metal container belonging to the steamship company in which the packages were stowed constitutes the shipper's package of goods.

Statutory Provisions Involved.

The basis of this petition is the general Federal Maritime Law established by a bellwether decision of this Court in *St. Johns Corp. v. Cia. Geral* that even where the carrier has the option to stow cargo on or underdeck, a clean bill of lading imports underdeck stowage of the cargo, consequently, when the carrier stows the cargo on the deck of the ship without stating on the bill of lading that the cargo is so stowed, the carrier is guilty of a deviation or breach of contract of carriage which deprives it of any limitation of liability.

However, in enacting certain sections of the U. S. Carriage of Goods by Sea Act (46 U.S.C. Sec. 1300 thru 1315), Congress, by implication has adopted the Supreme Court rule stated above, and has legislated around it in relevant part as follows:

46 U.S.C.:

Section 1301(c):

> "The term 'goods' includes goods, wares, merchandise and articles of every kind whatsoever, except live animals and *cargo which by the contract of carriage is stated as being carried on deck* and is so carried." (Italics added.)

Section 1304(4):

> "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach

of this Act [§§ 1300-1315 of this title] or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable."

Other Sections:

Section 1312:

"Provided further, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter."

Section 1303(8):

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act [§§ 1300-1315 of this title], shall be null and void and of no effect."

Section 1304(5):

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. • • • By Agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that

mentioned in this paragraph may be fixed: Provided That such maximum shall not be less than the figure above named. • • •"

Statement of the Case.

Preliminary Statement.

Jurisdiction of the Federal District Court in the first instance is based on 28 U.S.C. Sec. 1333.

This is an action in admiralty to recover the sum of $102,917.08 representing the value of Rosenbruch's (petitioner herein) shipment of 129 packages of household goods and effects stowed in the forty-foot long metal container belonging to the steamship company (respondent herein) and lost overboard from the deck of its vessel during common carriage by sea from New York to Hamburg, Germany. This appeal is from a judgment entered after a motion for partial summary judgment limiting Rosenbruch's recovery to $500 on the ground the shipowner's container, and not the packages stowed inside, was the shipper's package of goods within the purview of Section 4(5) of COGSA.

Your petitioner, Rosenbruch, argued below that, in any event, the steamship company was not entitled to any limitation of liability by reason of the fact it was guilty of a deviation within the rule of this Court under *St. Johns Corp. vs. Cia. Geral,* 263 U.S. 119 (1923).

The District Court held that the carrier's reusable forty-foot metal container was Rosenbruch's package of goods. Since the District Court, in considering the motion for summary judgment, overlooked Rosenbruch's arguments and affidavits with respect to the deviation issue, a second argument of the motion was had, and a subsequent order

was entered on March 27, 1973 by the said District Court holding that the carrier was not guilty of a deviation.

On appeal, the Court of Appeals for the Second Circuit affirmed both orders of the District Court on grounds similar to those of the District Court.

Facts.

The facts in the case were not in dispute.

Santini Brothers, petitioner's freight forwarder, made arrangements with the respondent steamship company to transport the shipment of 129 packages of household goods by sea from New York to Hamburg on its container vessel the Container Forwarder, which carried only containers. In conjunction therewith, the steamship company supplied its own forty-foot permanent metal container #183333 to the forwarder for pre-stowing the shipment.

When Rosenbruch's freight forwarder filled in the dock receipt and form of bill of lading supplied by the steamship company, it inserted on the face of both the following clause: "Stow under deck only." The dock receipt as thus claused was signed and returned immediately to the trucker at the pier as a receipt for the goods; however, the validated bill of lading was issued to the shipper's agent at an unknown subsequent date. Before the bill of lading was issued by the steamship company, the under-deck stowage clause was deleted.

The steamship company did not indicate on the face of the bill of lading that the shipment was stowed *on* deck. Clause 7 of its printed bill of lading provides in part "• • • containers may be stowed on deck unless the bill of lading is claused 'stow under deck' on the face hereof • • •."

Despite the fact the bill of lading was originally claused: "Stow under deck only", Rosenbruch's shipment was stowed on the weather deck of the vessel, and the steamship company charged Rosenbruch the same freight rate as it charged shippers whose goods were stowed in containers under deck.

Since the voyage commenced in January, 1971, it was a winter crossing of the North Atlantic Ocean when heavy weather is common and an expected occurrence. All the shipments stowed in the containers underdeck arrived safely at the completion of the voyage. Thirty-two of the containers stowed on deck were lost overboard from the deck of the vessel, including the one with Rosenbruch's goods.

Reasons for Granting the Writ

1. The decision of the court below directly conflicts with an indistinguishable entrenched decision of this court.

This Supreme Court in *St. Johns Corp. v. Cia. Geral*, 263 U.S. 119, established the relevant law in 1923 that stowage of cargo on the weather deck of a ship where the bill of lading does not indicate the fact of such stowage constitutes a deviation—notwithstanding the ship's option as to such stowage. There, the shipowner agreed to carry 800 barrels of rosin "on or under-deck, ship's option". After receipt of the cargo, the shipowner issued a "clean" bill of lading, i.e., there was no endorsement indicating that the cargo was stowed on deck. The shipowner stowed the barrels on the deck of its ship, and commenced the voyage. The barrels were jettisoned during the voyage because of a storm. The shipowner there argued that it was not guilty of a deviation in stowing the shipment on deck since it had the option to stow the cargo

on deck or underdeck in accordance with the freight booking agreement, and therefore it was unnecessary for the bill of lading to show that the cargo was stowed on deck.

However, this Court disagreed, and held on p. 124 as follows:

> "We are not dealing with a case arising under a general port custom permitting above deck stowage notwithstanding a clean bill, with notice of which all shippers are charged. When there is no such custom and no express contract in a form available as evidence, a clean bill of lading imports under deck stowage. *The Delaware,* 14 Wall. 579, 602, 604, 605. Upon this implication respondent had the right to rely. To say that the shipper assented to stowage on deck is not correct. It gave the vessel an option, and the clean bill of lading amounted to a positive representation by her that this had been exercised and that the goods would go under deck.
>
> By stowing the goods on deck the vessel broke her contract, exposed them to greater risk than had been agreed and thereby directly caused the loss. She accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit, and must account for the value at destination."

The Court of Appeals in the *Rosenbruch* case held that it was not a deviation for the shipowner to stow its container with Rosenbruch's cargo on the weather deck of the ship because the carrier's bill of lading terms and tariffs gave it the option to stow the shipment on deck notwithstanding an underdeck bill of lading. The few words of the Court of Appeals dealing with the entire issue of deviation (because of on-deck stowage) and which

clearly conflict with the Supreme Court's decision, *supra,* are reproduced in their entirety as follows:

> "Appellant also contends that the stowage of the container on the weather deck rather than below deck was such an unreasonable deviation from the contract of carriage as to deprive the carrier of the limitation of liability provided for in the bill of lading. In short, he claims that such stowage was not a 'reasonable deviation' within the meaning of Section 4(4) of COGSA, 46 U.S.C. Sec. 1304(4) (1970). We disagree.
>
> The short answer to this claim is twofold. First, the District Court specifically found that although Santini had inserted in the bill of lading the provision 'Stow under deck only', the carrier deleted this provision from the original bill of lading before returning it to the shipper. It therefore was not part of the contract of carriage. We hold that the District Court's determination was correct, whether as a matter of law or as a finding of fact which was not clearly erroneous. *Dupont, supra* note 1, at 102.
>
> Second, The District Court also correctly held that an 'under deck' stowage provision in the bill of lading was prohibited by the applicable Tariff Rules and Regulations of the North Atlantic Continental Conference. The carrier was a member of the Conference. The Tariff applied to the Container Forwarder as a vessel operating within the jurisdiction of the Conference and was incorporated by reference in the bill of lading. *Under these circumstances, it was not a deviation to have stowed the container on the weather deck.*
>
> We hold that the District Court correctly rejected appellant's deviation claim.
>
> Affirmed." (Italics added).

The statute referred to in the Court of Appeals opinion, Sec. 1304(4), refers to deviation resulting from *geographical alteration* of the vessel's sailing route, and, by its silence as to on-deck stowage, preserves the rule of

this Court in *St. Johns Corp. v. Cia. Geral,* as to deviation resulting from *on-deck stowage.*

In addition, Sec. 1301(c), a definition section of the Carriage of Goods by Sea Act (46 U.S.C. 1300-1315), similarly, by implication, preserves the rule of this Court that on-deck stowage must be stated on the bill of lading.

The Court of Appeals refused to follow an earlier decision of the Second Circuit, *Encyclopedia Britannica v. SS Hong Kong Producer,* 422 F 2d 7 (2 Cir—1969) which relied extensively on *St. Johns Corp. v. Cia. Geral, supra,* e.g., at page 16:

> "As in the *St. Johns* case the option could not be left to be exercised by the actual placing of the cargo on deck or below deck. The bill of lading did not, therefore, qualify the goods within the exception to sec. 1301(c) as '• • • cargo which by the contract of carriage is stated as being carried on deck • • •'."

2. The recurring question of stowage of containers on deck has become of great importance to all those in the shipping industry, in export and import trade and in marine insurance.

In the 1960s, shipowners, in the interests of economy in handling cargo, fostered containerization and containerships in order to eliminate individual handling of numerous small packages of goods by hand. Approximately 75% of all general cargo shipments from the United States in international trade are now made in the containerized or mechanized form.

Containers are huge reusable boxes generally either twenty feet or forty feet long, eight feet high and eight

feet wide. They are usually owned or leased by the shipowners. They consist of a steel rectangular frame-work, with side and top panelling made of very thin and light-weight materials such as aluminum, fiberglass or steel. This light-weight frail panelling cannot withstand boarding seas during heavy weather, consequently, in the instant case, when heavy weather was encountered during the ocean crossing, 32 containers became damaged by the seas and washed overboard. The cargo stowed under deck arrived safely.

There have been numerous incidents of similar losses, and the questions herein will recur in the future.

3. The court below deliberately ignored the true facts of the case and perverted the congressional objective of 46 U.S.C. Section 1304(5) which was enacted to prevent the carriers from escaping liability by reason of package limitations.

The Court of Appeals held that the 129 packages in which the petitioner's household goods were packed for export were not packages; instead, the Court held that the shipowner's permanent reusable forty foot long equipment (its container) was Rosenbruch's goods. Thus, the Court engaged in a manifest fiction in order to enable the steamship company to virtually escape liability by limiting its liability to $500 for the loss of petitioner's household goods valued at $102,918. The applicable package limitation section, 46 U.S.C. 1304(5) was enacted to prevent this very result by setting a minimum of $500 per package below which the carrier could not limit its liability. And, in Sec. 1303(8) Congress provided that any agreement in the contract of carriage lessening the carriers' liability as set forth in the Act shall be null and void.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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July 2, 1976

EXHIBIT A.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 127—September Term, 1975.

(Argued October 16, 1975 Decided April 19, 1976.)

Docket No. 75-7242

PETER ROSENBRUCH,

Plaintiff-Appellant,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant-Appellee.

Before:

MANSFIELD, TIMBERS and GURFEIN,

Circuit Judges.

Appeal by shipper of household goods from judgment for cargo loss entered in his favor in the Southern District of New York, Harold R. Tyler, Jr., *District Judge,* to the extent the judgment limited shipper's recovery against ocean carrier to $500 per package pursuant to limitation of liability clause in ocean carrier's bill of lading as authorized by COGSA.

Affirmed.

SEYMOUR SIMON, New York, N.Y. (Graham & Simon, New York, N.Y., on the brief), *for Plaintiff-Appellant.*

M. E. DeOrchis, New York, N.Y. (Brian D. Starer, and Haight, Gardner, Poor & Havens, New York, N.Y., on the brief), *for Defendant-Appellee.*

Timbers, *Circuit Judge:*

Once again we have before us what Judge Tyler aptly described as "another variant of the package limitation issue" which has been before us in various contexts in recent years.[1] We are called upon again to construe the $500 per package limitation of liability clause in an ocean carrier's bill of lading as authorized by Section 4(5) of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §1304(5)(1970). The variant in the instant case stems from the fact that the lost cargo consisted of household goods owned by the shipper-consignee.

The issue arises this time on an appeal by the shipper from a judgment in his favor for cargo loss entered March 21, 1975 in the Southern District of New York, Harold R. Tyler, Jr., *District Judge,* to the extent that the judgment limited the shipper's recovery to $500 per package. The essential questions presented are (1) whether the district court correctly held that the container in which the household goods were shipped was a "package" within the meaning of the limitation of liability clause in the ocean carrier's bill of lading as authorized by COGSA; and (2) whether the district court correctly held that stowage of the container on deck rather than below deck was not such an "unreasonable deviation" from the contract of carriage

1 See, e.g., Judge Friendly's seminal opinion in *Leather's Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800 (2 Cir. 1971); see also *DuPont de Nemours International S.A.* v. *S.S. Mormacvega,* 493 F.2d 97 (2 Cir. 1974), and *Royal Typewriter Co.* v. *M/V Kulmerland,* 483 F.2d 645 (2 Cir. 1973)—to mention but a few cases involving this issue that have been before us.

as to deprive the carrier of the limitation of liability provided for in the bill of lading.

We agree with the district court's holding on both questions. We affirm.

I.

The facts are not in dispute. The case was presented to Judge Tyler on cross-motions for summary judgment on the issue of limitation of liability.[2] We shall summarize briefly only those facts necessary to an understanding of our rulings on the questions presented.

The shipper and consignee was plaintiff Peter Rosenbruch. The ocean carrier was defendant American Export Isbrandtsen Lines, Inc. (Export). The vessel involved was the S.S. Container Forwarder; it was owned and operated by Export and was designed for container carriage only. Plaintiff contracted with an international freight forwarder, Seven Santini Bros., Inc. (Santini), to handle the shipment of his household goods from Norwood, New Jersey, to Hamburg, Germany.

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2 Judge Tyler in his opinion and order of March 15, 1973, supplemented by his order of March 27, 1973, granted defendant's motion for summary judgment on the issue of limitation of liability. He denied plaintiff's cross-motion on the same issue.

Cutting through the procedural morass that ensued as a result of plaintiff's filing and then withdrawing notices of appeal from Judge Tyler's non-final orders of March 15 and 27, 1973, there eventually emerged on March 21, 1975 a final judgment entered upon the stipulation of the parties. The judgment is in favor of plaintiff in amount of $500 and specifically provides that it "is final in respect to both liability and damages." It is from this judgment that the instant appeal has been taken.

We have not been informed as to the reason for the two year delay between the initial orders entered in March 1973 and the final judgment entered in March 1975. We do note, however, that during this period our opinions were filed in *DuPont* and *Kulmerland, supra* note 1, both of which are referred to later in this opinion. Judge Tyler was the district judge in *Kulmerland.* 346 F.Supp. 1019 (S.D.N.Y. 1972).

Santini, on behalf of plaintiff, handled all details of the shipment, including preparing the bill of lading,[3] other paper work, customs clearance and packing the goods for shipment. At the end of December 1970, Santini requested and obtained without charge from a division of Export a standard 40′ x 8′ x 8′ container; took it at plaintiff's expense to the latter's home in New Jersey; loaded it with plaintiff's household goods; sealed it; and delivered it to Export at Pier 13 on Staten Island on January 8, 1971.

Before loading and sealing the container, Santini had booked passage for the container by Export aboard the S.S. Container Forwarder scheduled to depart on January 9, 1971 from New York for Hamburg via the North Atlantic crossing.

The vessel sailed from New York as scheduled on January 9. Heavy weather was encountered on the trans-

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3 The bill of lading dated January 8, 1971 on Export's printed form was filled out by Santini. It stated that the shipper was "Santini Brothers Inc. For Peter Rosenbruck"; that the originating carrier to steamer was "Santini Brothers Inc."; that the consignee was "Peter Rosenbruck . . . Frankfurt, Main, Germany"; that the vessel was the "Forwarder"; that the port of loading was "Pier 13, Staten Island, N.Y."; that the port of discharge was "Hamburg". Then of particular importance to the issues in the instant case were the following entries in the bill of lading which were typed in by Santini:

(1) In a column headed "No. Of Cont. Or Other Pkgs." there is the figure "1".

(2) In another column headed "Description Of Goods" (which in turn is a sub-column under the heading "PARTICULARS FURNISHED BY SHIPPER") there appears "40′ CMLU #183333 Cont. Booking #8 used household goods."

There are two other items of significance, one of which appears on the bill of lading and the other stricken out:

(1) "SHIPPERS LOAD AND COUNT" was stamped on by Export in large block letters before the bill of lading was returned to Santini.

(2) "Stow under deck only" was typed in by Santini but, as the district court noted, was "entirely blacked out and completely illegible" in the original bill of lading returned by Export to Santini.

Atlantic crossing, during the course of which the container loaded with plaintiff's household goods, and 31 other containers, were lost at sea. All the containers were stowed on the weather deck, not under deck.

Plaintiff, invoking the admiralty and maritime jurisdiction of the district court, commenced this action on December 28, 1971. He sought to recover from Export the sum of $102,917.08[4] representing the value of his household goods which Export admits were lost at sea.

As the result of the cross-motions for summary judgment, Judge Tyler sustained Export's claim that its liability is limited to $500, for which there was entered the judgment in favor of plaintiff from which the instant appeal has been taken.

II.

We turn directly to appellant's contention that the container in which his household goods were shipped was not a package within the meaning of the $500 limitation of liability clause of the bill of lading as authorized by COGSA.

Given the limitation of liability clause in the instant bill of lading[5] and the provision of COGSA which authorizes

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4 The parties have stipulated that, if the district court's $500 limitation of liability determination should be reversed, plaintiff is to recover $35,000.

5 Section 17 of the bill of lading provides in relevant part:

> "In case of any loss or damage to or in connection with goods exceeding in actual value the equivalent of $500 lawful money of the United States, per package, or, in case of goods not shipped in packages, per shipping unit, the value of the goods shall be deemed to be $500 per package or per shipping unit. The Carrier's liability if any, shall be determined on the basis of a value of $500 per package or per shipping unit or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher than $500 per package or shipping unit shall have been declared in writ-

such limitation,[6] the critical facts determinative of this issue are those with respect to the selection and packing of the container, together with the provisions of the bill of lading which relate to the package issue.

Here the shipper's agent alone loaded the container which he obtained from the carrier, rather than constructing separate wooden crates or containers. The metal container was loaded with the shipper's goods only, not those of any other shipper. The contents of the container were not separately packed or labeled. The shipper's agent selected the voyage and the vessel for the shipment. He stated on the bill of lading that one package or container was involved and described the contents as "used household goods." The carrier was not involved at all in packing the container.

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ing by the Shipper upon delivery to the Carrier and inserted in this bill of lading and extra charge paid. . . ."

This is substantially the same limitation of liability clause which we have construed many times before. E.g., *DuPont*, *supra* note 1, at 100 n. 8; *Leather's Best*, *supra* note 1, at 805-06.

6 Section 4(5) of COGSA, 46 U.S.C. §1304(5) (1970), provides in relevant part:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. . . .
>
> By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. . . ."

The legislative purpose behind this statute, as applied to container shipping which developed after its enactment in 1936, has been discussed in our prior opinions. See *Kulmerland*, *supra* note 1, at 648-49; *Leather's Best*, *supra* note 1, at 814-17; *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft*, 375 F.2d 943, 945 (2 Cir.), *cert. denied*, 389 U.S. 831 (1967).

While the facts of these package cases vary widely, we think that this is about as clear a one as we have seen for holding that the container constituted a package for the purposes of Section 4(5) of COGSA. Indeed, it comes very close to the hypothetical case envisoned by Judge Friendly in *Leather's Best, supra* note 1, at 815, where the shipper would load the container on his own premises and the bill of lading would disclose nothing with respect to the number of units within the container.

In any event, unless and until Congress resolves the limitation of liability problems created by the new container age, we think that the "functional economics test" —also referred to as the "functional package unit test"— enunciated in *Kulmerland, supra* note 1, at 648-49, while not solving the problem entirely, offers as good a judicial interpretation of the word "package" in Section 4(5) as we have seen. Under that test the shipment in a container of several items that are separately suitable for shipment would entitle the shipper on declaring them to extend the $500 limitation to each of the separate packages. And it must be remembered that the shipper, by using the container, is getting a 10% reduction in the freight rate, thus avoiding the cost of independent packaging that might otherwise be incurred. This should enable him to obtain additional insurance if necessary.

Moreover in the instant case the application of the *Kulmerland* rule strikes us as particularly appropriate since appellant's household goods, absent a container, would not have been shipped in separate packages. They would have been shipped in a large wooden crate or container approximating the size of the metal container that was actually used.

We hold that the district court correctly concluded that the container in which appellant's household goods were

shipped was a package within the meaning of the $500 limitation of liability clause of the bill of lading as authorized by Section 4(5) of COGSA.

III.

Appellant also contends that the stowage of the container on the weather deck rather than below deck was such an unreasonable deviation from the contract of carriage as to deprive the carrier of the limitation of liability provided for in the bill of lading. In short, he claims that such stowage was not a "reasonable deviation" within the meaning of Section 4(4) of COGSA, 46 U.S.C. §1304(4) (1970). We disagree.

The short answer to this claim is twofold. First, the district court specifically found that, although Santini had inserted in the bill of lading the provision "Stow under deck only", the carrier deleted this provision from the original bill of lading before returning it to the shipper. It therefore was not part of the contract of carriage. We hold that the district court's determination was correct, whether as a matter of law or as a finding of fact which was not clearly erroneous. *Dupont, supra* note 1, at 102.

Second, the district court also correctly held that an "under deck" stowage provision in the bill of lading was prohibited by the applicable Tariff Rules and Regulations of the North Atlantic Continental Conference.[7] The carrier was a member of the Conference. The Tariff applied to the Container Forwarder as a vessel operating within the jurisdiction of the Conference and was incorporated by

7 Trailer/Container Traffic General Rule No. 13( ) of the Conference's Tariff Rules and Regulations provides:

"Since it is necessary that Containers be stowed on or under deck at the Member Lines' option, Bill of Lading specifically clausedprovides under deck stowage will NOT be issued."

reference in the bill of lading. Under these circumstances, it was not a deviation to have stowed the container on the weather deck.

We hold that the district court correctly rejected appellant's deviation claim.

Affirmed.

EXHIBIT B.

Order by Tyler, D. J., Dated March 27, 1973.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The Court having held a further hearing on March 23, 1973, on plaintiff's cross-motion for partial summary judgment in its favor holding defendant is not entitled to limit its liability to $500 for loss of the container, and the Court having heard further argument from counsel for both sides and

HAVING NOTED that the relevant bill of lading, as prepared by plaintiff's FMC-licensed forwarding agent, contained a notation on its face, "Stow Under Deck Only," and

HAVING NOTED that Clause 7 of the printed form contains a provision as follows:

> "Goods may be stored in container(s). Containers may be stowed on deck (unless this bill of lading is claused 'stow under deck' on the face hereof) and when so stowed shall be deemed for all purposes to be stowed under deck,"

and,

HAVING NOTED that the Tariff Rules and Regulations of the North Atlantic Continental Conference, filed with the Maritime Commission as Freight Tariff 29 FMC-4, which the Court finds applicable to the Container Forwarder, a container vessel, on this particular North Atlantic voyage, and to the shipment in suit, contains Trailer/Container Traffic General Rule No. 13 C, which provides as follows:

> "Since it is necessary that Containers be stowed on or under deck at the Member Line's options,

> Bill of lading specifically clausedto provide under-deck stowage will NOT be issued,"[1]

and

HAVING FOUND that before signing of the bill of lading submitted by the Forwarding Agent, the Carrier blocked out in solid black ink the words "Stow Only Under Deck", so that they became illegible on the shiper's copy,[a] and that the Plaintiff's Forwarding Agent accepted the bill of lading as changed,

Now, upon further consideration and reargument, the Court affirms its Order and Opinion dated March 15, 1973, denying plaintiff's cross-motion.

Dated: March 27, 1973.

/s/ H. R. TYLER, JR.
U. S. D. J.

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[1]See Footnote 12, *Encyclopedia Brittanica v. Hong Kong Producer*, 422 F. 2d 7, 18 (2 Cir., 1969), 1969 A.M.C. 1741, 1756.

[a]See Appendix.